

**Nathan R. Rietmann, OSB #053630**  
Rietmann Law P.C.  
1270 Chemeketa St. NE  
Salem, Oregon 97301  
Phone: 503-551-2740  
Email: [nathan@rietmannlaw.com](mailto:nathan@rietmannlaw.com)  
Phone: (503) 551-2740 / Fax: (888)-700-0192  
Attorneys for Plaintiff Klamath Irrigation District

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
MEDFORD DIVISION

**KLAMATH IRRIGATION DISTRICT,**

Plaintiff,

v.

**UNITED STATES BUREAU OF  
RECLAMATION, DAVID BERNHARDT,  
Acting Secretary of the Interior, in his official  
capacity, BRENDA BURMAN, Commissioner  
of the Bureau of Reclamation, in her official  
capacity, and ERNEST CONANT, Director of  
the Mid-Pacific Region, Bureau of  
Reclamation, in his official capacity, and  
JEFFREY NETTLETON, in his official  
capacity as Area Manager for the Klamath  
Area Reclamation Office.**

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**Nature of Action**

1. Plaintiff Klamath Irrigation District brings this action for declaratory and injunctive relief to protect private property rights (i.e., vested water rights) belonging to itself and its landowners from Defendants' regular, sustained, and ongoing violations of the Reclamation Act of 1902, Ch. 1093, 32 Stat. 388 ("Reclamation Act") and the Fifth Amendment to the United States Constitution.

2. The past, present, and future agency actions, inactions, findings, and conclusions that Plaintiff is asking the Court to declare unlawful, set aside, or restrain are being carried out

1 by Defendant United States Bureau of Reclamation (“Reclamation”) and its officers and agents  
2 pursuant to and in accordance with its proposed action evaluated by the National Marine  
3 Fisheries Service (“NMFS”) and United States Fish and Wildlife Service (“FWS”) (collectively  
4 the “Services”) in their Biological Opinion on the Effects of the Proposed Klamath Project  
5 Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened  
6 and Endangered Species (“2013 BiOp”).

7 3. Defendants are imminently prepared to release, adopt, and implement a new  
8 BiOP (“2019 BiOp”) and associated Operating Plan (“2019 Plan”) that analyzes an amended  
9 proposed action that will continue the unlawful agency actions, inactions, decisions, findings,  
10 and conclusions that have resulted in irreparable harm to Plaintiff.

11 4. The past, present, and future agency actions, inactions, findings, and conclusions  
12 Plaintiff is asking the Court to declare unlawful, set aside, or restrain include, but are not limited  
13 to, the following:

- 14 a. Defendants’ are unlawfully using 320,000 acre-feet (or more) of water in Upper  
15 Klamath Lake (“UKL”) reservoir for instream purposes each year without a water  
16 right or other lawful authority under Oregon law in violation of Section 8 of the  
17 Reclamation Act. *See* 2013 BiOp, Pg. 27 *et seq.*
- 18 b. Defendants’ are unlawfully capping the amount of water Plaintiff, its landowners,  
19 and other water rights holders receive from UKL at less than the amounts  
20 Plaintiff, its landowners, and other water right holders are entitled to beneficially  
21 use under their water rights in violation of Section 8 of the Reclamation Act.
- 22 c. Defendants’ are unlawfully divesting Plaintiff, its landowners, and other water  
23 right holders of their vested water rights in the beneficial use of water in UKL, as  
24 elsewhere described in this Complaint, without purchasing such rights or  
25 condemning them “under judicial process” in accordance with state law, in  
26 violation of Sections 7 and 8 of the Reclamation Act.

d. Defendants are depriving Plaintiff, its landowners, and other water right holders of their vested water rights in the beneficial use of water in UKL without due process of law in violation of the Fifth Amendment to the United States Constitution through the actions, inactions, findings, and conclusions generally identified above and more specifically alleged herein.

#### **Jurisdiction, Venue, and Waiver of Sovereign Immunity**

5. Jurisdiction arises under 5 U.S.C. §§ 701–706 and 28 U.S.C. §§ 1331, 2201, and 2202.

6. The acts alleged herein occurred in the District of Oregon and venue is therefore appropriate pursuant to 28 U.S.C. § 1391.

7. Defendants’ sovereign immunity is waived pursuant to 5 U.S.C. § 702 because Plaintiff is making claims for equitable relief, not money damages.

#### **Parties**

8. Plaintiff Klamath Irrigation District (“KID”) is an irrigation district duly constituted and existing pursuant to ORS Chapter 545. KID and its patrons hold vested water rights entitling them to beneficially use water in UKL reservoir, including water stored by Defendant Reclamation, for purposes of irrigation. Under Oregon law, all private property interests held by Plaintiff, including vested water rights, are held in trust for the benefit of its landowners. Plaintiff brings this action in a representational capacity to protect the rights of its landowners as much as its own, as well as the rights of water right holders outside its own boundaries to whom Plaintiff owes affirmative water delivery obligations.

9. Defendant United States Bureau of Reclamation (hereafter “Reclamation”) is a federal agency, or bureau, within the United States Department of the Interior. Reclamation holds a water right entitling it to store water in UKL reservoir to benefit the separate irrigation rights of Plaintiff, its landowners, and other water right holders within the Klamath Reclamation Project. Defendant does not have a water right, limited license, instream lease, or any other legal

1 authorization under state or federal law to use water stored in UKL reservoir for instream  
2 purposes.

3 10. Defendant David Bernhardt is the Acting Secretary of the United States  
4 Department of the Interior. In such capacity, Defendant Bernhardt is directly responsible for  
5 administration of, and compliance with, federal reclamation law and other laws of the United  
6 States, including those pertaining to the Klamath Reclamation Project.

7 11. Defendant Brenda Burman is the Commissioner of the Defendant United States  
8 Bureau of Reclamation. In such capacity, Defendant Burman is directly responsible for  
9 administration of, and compliance with, federal reclamation law and other laws of the United  
10 States, including those pertaining to the Klamath Reclamation Project.

11 12. Defendant Ernest Conant is the Director of the Defendant United States Bureau of  
12 Reclamation Mid-Pacific Region Office. In such capacity, Defendant Conant is directly  
13 responsible for administration of, and compliance with, federal reclamation law and other laws  
14 of the United States, including those pertaining to the Klamath Reclamation Project.

15 13. Defendant Jeffery Nettleton is the Area Manager for the Defendant United States  
16 Bureau of Reclamation's Klamath Area Office. In such capacity, Defendant Nettleton is directly  
17 responsible for administration of, and compliance with, federal reclamation law and other laws  
18 of the United States, including those pertaining to the Klamath Reclamation Project.

19 **Allegations Common to All Claims**

20 14. The United States Congress enacted the Reclamation Act in 1902 to provide  
21 funding for irrigation projects in arid regions of the western United States.

22 15. Pursuant to Sections 7 and 8 of the Reclamation Act, Defendants are required to  
23 obtain water rights for Reclamation projects in accordance with state law, through appropriation,  
24 purchase, or "condemnation under judicial process."

25 16. Sections 7 and 8 of the Reclamation Act also require Defendants to comply with  
26 state laws relating to the control, use, or distribution of water.

17. Section 7 of the Reclamation Act, 43 U.S.C. § 421, states:

Where, in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under such sections, to cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

18. Section 8 of the Reclamation, 43 U.S.C. § 383, provides in relevant part:

Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

19. In 1905, the Oregon Legislative Assembly sought to advance the purposes of the Reclamation Act and the development of a Reclamation project in the Klamath Basin by enacting Chapter 5, Oregon Laws of 1905 and Chapter 228, Oregon Laws 1905.

20. Through enactment of Chapter 5, Oregon Laws of 1905 the State of Oregon granted to the United States, for purposes of irrigation and reclamation, authorization to lower the water level of certain lakes, including Upper Klamath Lake, and to use all or any part of the beds of such lakes for the storage of water in connection with reclamation or irrigation. By the same enactment, the State of Oregon ceded to the United States title to any land uncovered by the lowering of such lakes, to use for purposes in furtherance of the 1902 Act.

21. Through enactment of Chapter 228, Oregon Laws 1905, the State of Oregon specifically described the manner in which water could be appropriated for Reclamation projects in Oregon. Chapter 228, Oregon Laws 1905 provides in relevant part as follows:

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1 Whenever the proper officers of the United States, authorized by law to  
 2 construct works for the utilization of water within this State, shall file in the  
 3 office of the State Engineer a written notice that the United States intends to  
 4 utilize certain specified waters, the waters described in such notice and  
 5 unappropriated at the time of the filing thereof shall not be subject to further  
 6 appropriation under the laws of this State, but shall be deemed to have been  
 7 appropriated by the United States; *provided*, that within a period of three years  
 from the date of filing such notice the proper officer of the United States shall  
 file final plans of the proposed works in the office of the State Engineer for  
 his information; *and provided further*, that within four years from the date of  
 such notice the United States shall authorize the construction of such proposed  
 work.

8 22. On May 17, 1905, Defendant Reclamation filed notices of appropriation pursuant  
 9 to Chapter 228, Oregon Laws 1905 to appropriate all the then-unappropriated waters of the  
 10 Klamath Basin for the Klamath Reclamation Project. The notices stated that “[t]he United States  
 11 intends to use the above described waters in the operation of works for the utilization of water in  
 12 the State of Oregon under the provisions of . . . the Reclamation Act,” and that “[t]he Water is to  
 13 be used for irrigation, domestic, power, mechanical and other beneficial uses in and upon lands  
 14 situated in Klamath Oregon and Modoc California counties.”

15 23. Following authorization of the Klamath Project, facilities were constructed,  
 16 previously existing facilities were improved and incorporated into the Klamath Project, and  
 17 individual landowners began applying water to beneficial use on their lands after entering into  
 18 contracts with the United States to repay the costs of the irrigation works developed by the  
 19 United States.

20 24. KID was formed in 1917 and thereafter entered into a contract with Reclamation  
 21 in 1918 to repay the costs of construction, operation, and maintenance of the Klamath Project.  
 22 The contract has since been amended several times, most notably in 1954. By virtue of its  
 23 contract with Defendant, Plaintiff has a perpetual obligation to operate and maintain certain  
 24 irrigation works owned by the United States and an affirmative non-discretionary legal and  
 25 contractual obligation to deliver water to fulfill the appurtenant water rights of its own  
 26 landowners. Plaintiff also has a non-discretionary legal and contractual obligation to deliver

1 water needed to fulfill water rights held by certain districts and landowners located outside  
2 Plaintiff's own boundaries.

3 25. Defendant has no discretion or authority to limit the amount of water made  
4 available to Plaintiff and its landowners to less than the amount they are entitled to beneficially  
5 use in accordance with their appurtenant water rights.

6 26. On February 24, 1909, the Oregon Legislative Assembly enacted the Water  
7 Rights Act, which means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252,  
8 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430,  
9 540.505 to 540.585 and 540.710 to 540.750.

10 27. Pursuant to ORS 537.110, all water within the state from all sources of water  
11 supply belongs to the public. However, subject to existing rights, individuals may obtain the  
12 right to use the public's water by applying for and obtaining a water right. Under Oregon law,  
13 the use of the public's water is a property right. *See* ORS 307.010(1)(b)(D)). The property right  
14 is said to be usufructuary because, although a water right grants the right to use the public's  
15 water, ownership of the water itself remains vested in the public. Oregon courts have recognized  
16 that the right to the use of water constitutes a vested property interest which cannot be divested  
17 without due process of law.

18 28. Oregon law (ORS 539.007(11)) defines water rights established prior to the  
19 adoption of the Water Rights Act on February 24, 1909 as undetermined vested rights. The  
20 Water Rights Act provides at ORS 539.010(4) that undetermined vested rights are not to be  
21 impaired or affected by any of its provisions. However, ORS 539.010(4) of the Water Rights  
22 Act also provides that the scope and attributes of all undetermined vested rights are to be  
23 determined through an adjudication conducted in accordance with ORS Chapter 539.

24 29. The adjudication process set forth in ORS Chapter 539 consists of two phases: (1)  
25 an administrative phase, and (2) a judicial phase. During the administrative phase, the  
26 adjudicator investigates the waters at issue, hears claims and exceptions, and ultimately issues a

1 Final Order of Determination setting forth the relative water rights of the parties. Once the Final  
2 Order of Determination is issued, it is filed with the circuit court having jurisdiction of the  
3 matter. The Final Order of Determination reflects enforceable water rights under Oregon law,  
4 unless and until it is stayed pending the outcome of the judicial phase or is amended or changed  
5 during the judicial phase of the adjudication process. The circuit court proceeding culminates in  
6 the issuance of a decree finally determining the relative rights of all parties claiming a pre-1909  
7 right to use the waters at issue, subject to any appeal.

8 30. In 1975, the State of Oregon initiated a general stream adjudication of the waters  
9 of the Klamath Basin (hereafter “Klamath Adjudication”).

10 31. While the administrative phase of the adjudication of the waters of the Klamath  
11 Basin was pending, and upon the written advice of the Oregon Attorney General issued on  
12 March 18, 1996, the State of Oregon did not regulate or enforce pre-1909 water rights in the  
13 Klamath Basin as such rights were wholly undetermined and regulation would necessarily  
14 involve pre-determination of the parties’ claims. However, based on a U.S. Solicitor  
15 memorandum dated January 9, 1997, the United States took the position that it had an obligation  
16 to “use its best efforts to operate the Project consistent with existing water rights.” U.S. Reg.  
17 Solicitor Memo, Jan 9, 1997, Pg. 5. While the United States acknowledged that the precise  
18 nature of the existing rights relating to the Project was not known with certainty because the  
19 rights had not been adjudicated, it nevertheless believed these existing rights could be  
20 “reasonably estimated” and that the government had a duty to ensure the Project was “operated  
21 based on the best available information.” *Id.* at 6.

22 32. At all times material prior to the completion of the administrative phase of the  
23 Klamath Adjudication, the United States asserted, and it was otherwise assumed, that all water  
24 rights associated with the Klamath Project were owned or held by the United States. The United  
25 States also asserted, and it was otherwise assumed, that the Klamath Tribes and other tribes held  
26 water rights in UKL that were senior to those of Plaintiff and others within the Klamath Project.



1 While the administrative phase of the Klamath Adjudication was pending, the United States  
2 distributed water from UKL based on these assumptions.

3 33. On March 7, 2013, thirty-eight (38) years after the commencing the general  
4 stream adjudication for the Klamath Basin, the State of Oregon, via the Water Resources  
5 Department (“OWRD”), issued its Findings of Fact and Final Order of Determination (“FFOD”)  
6 and filed it with the Klamath County Circuit Court, thus completing the administrative phase of  
7 the adjudication.

8 34. In May 2013, the Services issued the 2013 BiOp, which analyzed modifications to  
9 the Bureau’s operation of the Klamath Project, including the use of Project water for augmented  
10 instream flows (the “Proposed Action”). At or shortly after the issuance of the 2013 BiOp,  
11 Reclamation adopted the Proposed Action. Thus, the Proposed Action described in the 2013  
12 BiOp was formally adopted by Reclamation after the OWRD issued its FFOD. Since the time of  
13 its formal adoption, Defendant Reclamation has operated the Klamath Project in accordance with  
14 the 2013 BiOp.

15 35. Neither the 2013 BiOp nor the Proposed Action accounted for the effects of the  
16 FFOD issued in the Klamath Adjudication on March 7, 2013, despite the fact that it provided for  
17 modification once the effects were known:

18 The potential effects of the Findings of Fact and Order of Determination on  
19 management of water in the Klamath Basin, including Reclamation’s Project  
20 operations, are uncertain at present and will likely remain uncertain for several  
21 years. Therefore, the proposed action is not modified based on the Findings of  
22 Fact and Order of Determination. In the future, when the consequences of the  
adjudication are understood, the proposed action will be modified if necessary in  
accordance with parties’ legal rights to beneficial use of water. (emphasis added).

23 36. In February 2014, OWRD filed an Amended and Corrected Findings of Fact and  
24 Final Order of Determination (“ACFFOD”) with the Klamath County Circuit Court.

25 37. Pursuant to ORS 539.130(4) and ORS 539.170, the ACCFOD is in full force and  
26 effect and water is to be distributed in accordance with the ACCFOD unless or until the  
ACCFOD is stayed either wholly or in part pursuant to ORS 539.180.

1           38.     Following the issuance of the FFOD and the ACCFOD, the legal rights of the  
2 parties to this action were known and enforceable under Oregon law.

3           39.     Reclamation has not sought to stay the ACCFOD either wholly or in part, and the  
4 ACCFOD has not otherwise been stayed by any other party pursuant to ORS 539.180.

5           40.     The issuance of the FFOD / ACCFOD fundamentally changed the legal paradigm  
6 governing the distribution of water in the Klamath Basin. Specifically:

7           (a)     The ACCFOD is presently enforceable under Oregon law, and must be  
8 followed by all owners of determined claims pending the judicial review phase of  
9 the Klamath Basin Adjudication before the Klamath County Circuit Court.  
10           ORS 539.130; ORS 539.170.

11           (b)     Defendant Reclamation is the owner of a right to store water—  
12 specifically, a maximum annual volume of 486,828 acre-feet of water in UKL  
13 reservoir to benefit the separate irrigation rights held by Plaintiff and other water  
14 right holders. KBA\_ACFOD\_07060, 07084, 07117.

15           (c)     Defendant Reclamation is only entitled to store water in UKL reservoir to  
16 satisfy the water rights of Plaintiff, its landowners and other secondary water right  
17 holders. KBA\_ACFOD\_7061, 07075.

18           (d)     Irrigators within the Klamath Project hold water rights entitling them to  
19 live flow and the use of water that United States stores in UKL reservoir for the  
20 purposes of irrigation and other beneficial uses. *See e.g.*, KBA\_ACFOD\_07075,  
21 07084, 07086, 07160, 07061.

22           (e)     Defendant Reclamation does not hold an instream water right entitling it  
23 to use water from UKL reservoir for instream purposes.

24           (f)     The Klamath Tribes' hold a water right entitling them to certain elevations  
25 of water in UKL at certain times of the year, but this right cannot be used to call  
26 the water rights of Klamath Project irrigators. KBA\_ACFOD\_04941.

1 (g) Neither the Hoopa nor the Yurok tribe have vested but undetermined  
2 water rights in UKL.

3 (h) Now that the ACFFOD has been issued, Oregon law (e.g., ORS 537.130,  
4 ORS 540.270) prohibits the use of water from the waters within the scope of the  
5 Klamath Basin Adjudication without a water right (e.g., water right, determined  
6 claim, instream lease, limited license).

7 41. Despite the issuance of the FFOD, and the subsequent issuance of the ACFFOD,  
8 Defendant Reclamation nevertheless formally adopted the Proposed Action described in the  
9 2013 BiOp and continues to manage the Klamath Project in accordance with the 2013 BiOp  
10 without regard to the enforceable determinations made in the Klamath Adjudication. This means  
11 Defendant Reclamation is unlawfully using water in UKL reservoir for its own instream  
12 purposes without a water right, notwithstanding the fact that Plaintiff, its landowners, and others  
13 hold water rights legally entitling them to the beneficial use of such water. Additionally,  
14 Defendants are limiting the amount of water Plaintiff, its landowners, and other water right  
15 holders are entitled to beneficially use under their water rights even though Defendants have no  
16 lawful authority to restrict Plaintiff and its landowners' beneficial use of water, and have neither  
17 purchased Plaintiff and its landowners' water rights nor condemned Plaintiff and its landowners'  
18 water rights "under judicial process" in accordance with Sections 7 and 8 of the Reclamation  
19 Act. Reclamation's actions are thus unlawful, or arbitrary, capricious, and an abuse of discretion,  
20 and must be set aside.

21 42. On December 21, 2018, Reclamation issued a Biological Assessment as part of a  
22 consultation process under the Endangered Species Act. Reclamation amended its proposed  
23 action on February 15, 2019 ("Amended Proposed Action"). The Services are expected to issue  
24 the new 2019 BiOp upon the Amended Proposed Action as soon as April 1, 2019. Reclamation  
25 is expected to adopt the Klamath Project Annual Operations Plan (the "2019 Plan") around the  
26 same time or shortly thereafter.

1           43. Under the Amended Proposed Action analyzed and reflected in the 2019 BiOp  
2 and 2019 Plan that Defendant is imminently prepared to issue, adopt, and implement Defendant  
3 has decided to:

- 4                   a. Continue using water in UKL reservoir for its own instream purposes  
5 without a water right in violation of Section 8 of the Reclamation Act to a  
6 greater extent than under the Proposed Action evaluated under the 2013  
7 BiOp.
- 8                   b. Continue limiting the amount of water that Plaintiff is able to deliver to  
9 itself and its landowners to an amount that is less than their water rights to  
10 an even greater extent than the Proposed Action evaluated under the 2013  
11 BiOp.
- 12                  c. Continue depriving Plaintiff and its landowners of their vested water rights  
13 as described in (a) and (b) above, without purchasing the vested rights or  
14 condemning the vested rights under judicial process in accordance with  
15 Oregon law, in violation of Sections 7 and 8 of the Reclamation Act.
- 16                  d. Continue denying Plaintiff and its landowners the due process to which  
17 they are entitled under the Fifth Amendment of the United States  
18 Constitution before depriving Plaintiff and its landowners of their vested  
19 water rights as described above.

20           44. Defendants do not intend to cure their unlawful actions alleged herein and their  
21 unlawful actions will continue if not restrained.

22           45. Defendants' unlawful actions are causing Plaintiff irreparable harm and the  
23 balance of the equities tips sharply in Plaintiff's favor. Defendant is capable of complying with  
24 the applicable law and using water in UKL the exact same manner it is today. However,  
25 Defendant is simply choosing to disregard the law.

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**FIRST CLAIM FOR RELIEF**

(Violation of the APA – Section 8 of Reclamation Act)

46. Plaintiff reasserts and realleges ¶¶ 1 to 45, as though fully set forth herein.

47. A district court may hold unlawful and set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; “contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A)–(C).

48. Defendants’ actions, inactions, findings, and conclusions in adopting and implementing the Proposed Action evaluated in the 2013 BiOp violate Section 8 of the Reclamation Act, which requires Reclamation to comply with state law in the control, appropriation, use, or distribution of water.

49. Defendants’ actions, inactions, findings, and conclusions in adopting and implementing the Proposed Action and using water stored in UKL reservoir for its own instream use without a water right or other authority under the laws of the State of Oregon violates Section 8 of the Reclamation Act, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

50. Defendants’ actions, inactions, findings, and conclusions in adopting and implementing the Proposed Action described in the 2013 BiOP and limiting Plaintiff and its landowners’ right to use water in UKL reservoir without lawful authority to do so, interferes with Plaintiff’s vested water rights, violates Section 8 of the Reclamation Act, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

51. Defendants’ actions, inactions, findings, and conclusions in adopting and implementing the Proposed Action and divesting Plaintiff and its landowners of the beneficial use of water under their water rights deprives Plaintiff of due process of law required by the Fifth Amendment to the United States Constitution, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

52. Defendants’ conduct as alleged herein is in excess of the authority granted to Defendants under Section 8 of the Reclamation Act and Defendants’ contracts with Plaintiff. Accordingly, Reclamation’s actions in adopting and implementing the Proposed Action must be held unlawful and set aside.

## SECOND CLAIM FOR RELIEF

(Violation of the APA – Section 7 of Reclamation Act)

53. Plaintiff reasserts and realleges ¶¶ 1 to 45, as though fully set forth herein.

54. A district court may hold unlawful and set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; “contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A)–(C).

55. Section 7 of the Reclamation Act requires Reclamation to acquire property rights, such as the right to use water under Oregon law, through Oregon’s appropriation process or “by purchase or condemnation under judicial process,” using the procedure set out by Oregon law. *See* 43 U.S.C. § 421.

56. Reclamation’s actions, inactions, findings, and conclusions in adopting and implementing the Proposed Action described in the 2013 BiOp, and thereby divesting Plaintiff and its landowners of their vested water rights without purchasing or condemning such rights “under judicial process” in accordance with state law, violates Section 7 of the Reclamation Act.

57. Defendants’ actions in violation of Section 7 of the Reclamation Act as alleged herein must be held unlawful and set aside.

### THIRD CLAIM FOR RELIEF

(Violation of the APA – Arbitrary and Capricious Baseline)

58. Plaintiff reasserts and realleges ¶¶ 1 to 45, as though fully set forth herein.

59. A district court may hold unlawful and set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; “contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A)–(C).

60. The 2013 BiOp, which was not issued until May 31, 2013, acknowledged that the FFOD was issued on March 7, 2013, yet also concluded that the “potential effects” of the FFOD were “uncertain” and therefore the proposed action was “not modified based on the Findings of Fact and Order of Determination.” (2013 BiOp at 3–4.)

61. The FFOD—and now the ACFFOD—defined the scope and attributes of enforceable water rights under Oregon law with priority dates of 1905. The effects of these water rights were known both at the time Defendant Reclamation received the 2013 BiOp during the subsequent period of time Defendants’ have implemented the Proposed Action described in the 2013 BiOp. Despite this, Defendants continued to proceed with the Proposed Action instead of modifying the Proposed Action.

62. Therefore, the decision not to modify the Proposed Action on the basis of the FFOD and ACFFOD was arbitrary and capricious. Because this action violates the APA, it must be held unlawful and set aside.

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**FOURTH CLAIM FOR RELIEF**

(Declaratory Judgment)

63. Plaintiff reasserts and realleges ¶¶ 1 to 45, as though fully set forth herein.

64. Under the Declaratory Judgment Act, “any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201.

65. Pursuant to 28 U.S.C. § 2202, a court granting a declaratory judgment may grant further necessary or proper relief, including injunctive relief.

**COUNT 1**

**Violation of Section 8 of Reclamation Act**

**Unlawfully using water**

66. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by using water stored in UKL reservoir for its own instream purposes during Plaintiff’s irrigation season because Defendants have not obtained a water right in accordance with Oregon law, and state and federal law do not otherwise authorize Defendants to use stored water in such manner.

67. Pursuant to 28 U.S.C. § 2202, Plaintiff is entitled to further injunctive relief enjoining Defendants from using water stored in UKL reservoir for their own instream purposes during Plaintiff’s irrigation season. Plaintiff asks that the restraints of the injunction not go into effect until April 1, 2020 so as to afford Defendants a reasonable period of time to secure the right to use water from UKL reservoir for instream purposes in accordance with Oregon law, as required by Section 8 of the Federal Reclamation Act, without causing any harm to endangered or protected species during the period in which Defendants are bringing themselves into legal compliance.

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**COUNT 2**

**Violation of Section 8 of the Reclamation Act**

**Unlawfully curtailing water**

68. Plaintiff is entitled to a declaratory judgment stating that Defendants have no lawful authority to limit the amount of water that is delivered to Plaintiff or its landowners at an amount that is less than the amount the landowners are able to put to beneficial use without waste under the water rights appurtenant to their land, if the water is physically available for delivery from UKL reservoir and the other conditions of the water right (e.g., season of use) are satisfied.

69. Pursuant to 28 U.S.C. § 2202, Plaintiff is entitled to further injunctive relief enjoining Defendants from limiting the amount of water that is delivered to Plaintiff or its landowners at an amount that is less than the amount the landowners are able to put to beneficial use without waste under the water rights appurtenant to their land, if the water is physically available for delivery from UKL reservoir and the other conditions of the water right (e.g., season of use) are satisfied. Plaintiff asks that the restraints of the injunction not go into effect until April 1, 2020 so as to afford Defendants a reasonable period to secure the right to use water from UKL reservoir for instream purposes in accordance with Oregon law, as required by Section 8 of the Federal Reclamation Act, without causing any harm to endangered or protected species during the period in which Defendants are bringing themselves into legal compliance.

**COUNT 3**

**Violation of Section 7 and 8 of Reclamation Act**

**Condemnation without judicial process**

70. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgment stating that Defendants may not divest Plaintiff and its landowners of their property interest in the beneficial use of water under their water rights as alleged herein without first purchasing or

1 condemning “under judicial process” those same rights, pursuant to Sections 7 and 8 of the  
2 Reclamation Act.

3 71. Pursuant to 28 U.S.C. § 2202, Plaintiff is entitled to further injunctive relief  
4 enjoining Defendants from divesting Plaintiff and its landowners of their property interest in the  
5 beneficial use of water under their water rights as alleged herein without first purchasing or  
6 condemning “under judicial process” those same rights, pursuant to Sections 7 and 8 of the  
7 Reclamation Act. Plaintiff asks that the restraints of the injunction not go into effect until April  
8 1, 2020 so as to afford Defendants a reasonable period to secure the right to use water from UKL  
9 reservoir for instream purposes in accordance with Oregon law, as required by Section 8 of the  
10 Federal Reclamation Act, without causing any harm to endangered or protected species during  
11 the period in which Defendants are bringing themselves into legal compliance.

#### 12 **COUNT 4**

#### 13 **Violation of the Fifth Amendment**

#### 14 **Right to Procedural Due Process**

15 72. Plaintiff reasserts and realleges ¶¶ 1 to 45, as though fully set forth herein.

16 73. The due process clauses of the Fifth Amendment to the United States Constitution  
17 prohibits deprivations of liberty and property interests without due process of law.

18 74. Due process requires, at a minimum, notice and opportunity for hearing  
19 appropriate to the nature of the case.

20 75. Section 7 of the Reclamation Act imposes procedural requirements on  
21 Reclamation prior to its use or appropriation of water rights, by requiring that the rights be  
22 purchased or condemned through judicial process. Reclamation has not sought to either  
23 purchase or condemn through judicial process the water rights of Plaintiff and its landowners.

24 76. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgment  
25 stating that Defendants’ have violated Plaintiff’s procedural due process rights protected by the  
26 Fifth Amendment to the United States Constitution by divesting Plaintiff and its landowners of

1 their vested water rights without purchasing or condemning “under judicial process” those same  
2 rights, pursuant to Sections 7 and 8 of the Reclamation Act.

3 77. Pursuant to 28 U.S.C. § 2202, Plaintiff is entitled to an injunction restraining  
4 Defendants from divesting Plaintiff and its landowners of their property interests in the  
5 beneficial use of water under their water rights as alleged herein without first purchasing or  
6 condemning “under judicial process” those same rights, pursuant to Sections 7 and 8 of the  
7 Reclamation Act, and thereby affording Plaintiff and its landowners the due process they are  
8 entitled to under the Fifth Amendment to the United States Constitution. Plaintiff asks that the  
9 restraints of the injunction not go into effect until April 1, 2020 so as to afford Defendants a  
10 reasonable period to secure the right to use water from UKL reservoir for instream purposes in  
11 accordance with Oregon law, as required by Section 8 of the Federal Reclamation Act, without  
12 causing any harm to endangered or protected species during the period in which Defendants are  
13 bringing themselves into legal compliance.

14 78. Declaratory relief is appropriate in this case both because an actual injury has  
15 occurred under Defendants’ adoption and implementation of the Proposed Action. In addition,  
16 the Amended Proposed Action reflected in the 2019 BiOp and 2019 Plan that Defendants are  
17 imminently prepared to adopt and implement will continue to cause injury to Plaintiff and its  
18 landowners that is substantively identical, in all material respects, to the injury being caused to  
19 Plaintiff and its landowners under the adoption and implementation of the Proposed Action.  
20 Therefore, Plaintiff and Reclamation have adverse legal interests and there is a substantial  
21 controversy between them of sufficient immediacy and reality to warrant the issuance of  
22 declaratory judgment and further injunctive relief.

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24 /////

25 /////

26 /////

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff request a trial by jury, and pray for judgment and an order  
3 against each Defendant:

- 4 1. Setting aside the unlawful actions of the Defendants under the APA;  
5 2. For declaratory relief setting forth the rights of the parties' rights under the  
6 Reclamation Act and the Fifth Amendment to the United States Constitution;  
7 3. For injunctive relief enjoining Defendants from violating the APA and the  
8 Reclamation Act and the Fifth Amendment to the United States Constitution, and from using  
9 water and otherwise interfering with or divesting Plaintiff and its landowners of their water rights  
10 in a manner not permitted under the law;  
11 4. For attorneys' fees, costs, and interest, as authorized by law; and  
12 5. Any other relief the Court deems just and proper.

13 DATED: March 27, 2019

14 Respectfully submitted by,

15 RIETMANN LAW P.C

16  
17 By: s/ Nathan R. Rietmann  
18 Nathan R. Rietmann, OSB #053630  
19 1270 Chemeketa St. NE  
20 Salem, Oregon 97301  
21 503-551-2740  
22 nathan@rietmannlaw.com  
23 Of Attorneys for Plaintiff  
24  
25  
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